

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	CASE NO.: 8:03-CR-77-T-30-TBM
	:	
SAMI AMIN AL-ARIAN,	:	
SAMEEH HAMMOUDEH,	:	
GHASSAN ZAYED BALLUT,	:	
HATIM NAJI FARIZ	:	

**SECOND MOTION OF THE UNITED STATES FOR A PRETRIAL CONFERENCE  
AND A PROTECTIVE ORDER PURSUANT TO  
THE CLASSIFIED INFORMATION PROCEDURES ACT**

The United States of America, by and through Paul I. Perez, United States Attorney for the Middle District of Florida, respectfully submits its Second Motion of the United States for a Pretrial Conference and a Protective Order Pursuant to the Classified Information Procedures Act<sup>1</sup> and states as follows:

1. The Classified Information Procedures Act (hereafter, "CIPA"), codified at 18 U.S.C. App. III, establishes procedures necessary for the handling of classified information by parties in a criminal case. Section 2 of the statute provides that "[a]t any time after the filing of the indictment or the information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in

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<sup>1</sup>The government filed its original motion for a pretrial conference pursuant to CIPA on July 7, 2003 (Docket No. 168). At that time, most of the intercepted FISA communications, which constitute the bulk of the evidence, remained classified, and the government anticipated that it would be required to produce those communications pursuant to CIPA. That motion, however, became moot when the government subsequently declassified all remaining FISA communications. The government has now located additional classified documents it wishes to produce for the court pursuant to CIPA.

connection with the prosecution.” Following such a motion, Section 2 provides that the District Court shall hold such a conference to establish the “timing of requests for discovery, the provision of notice required by Section 5 of this Act, and the initiation of the procedure established by Section 6 [to determine the use, relevance, or admissibility of classified information] of this Act.” Id.

2. Section 2 also permits the District Court to consider other matters relating to classified information, such as security procedures, clearances, and the like. The legislative history of CIPA emphasizes that no substantive issues concerning the discovery or use of classified information are to be decided in a pretrial conference under Section 2. See S. Rep. No. 823, 96<sup>th</sup> Cong., at 5-6, reprinted in 1980 U.S. Code Cong. & Admin. News at 4298-4299. Instead, CIPA requires such issues to be decided under Sections 4 and 6.

3. Section 3 of CIPA further provides that upon a motion by the government the court “shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant. . . .” Id.; See Snepp v. United States, 444 U.S. 507, 512-13 & nn. 7-8 (1980) (noting that unless the government has adequate mechanisms to prevent unauthorized disclosures, potential sources of classified information may be unwilling to provide such information to the intelligence gathering community); id. at 514-15, (stating that unauthorized disclosures might cause irreparable harm to the government and that it may be practically impossible to seek redress against the disclosing party).

4. In the instant case, the defendants have made a number of discovery requests and counsel for the United States has concluded that classified information

may arise in connection with the prosecution of the case. As a result, the United States respectfully requests that the Court hold a pretrial conference to consider matters relating to the classified information at a time mutually convenient to the Court and the parties.

5. The United States also requests that the Court enter a Protective Order to prevent unauthorized disclosure and dissemination of such classified information. Most cases involving the disclosure of classified information arise in the context of a “greymail” situation; where a criminal defendant who has obtained classified information before being charged with a crime threatens to disclose such information during the course of the trial, hoping the United States will decide to abandon the prosecution rather than risk disclosure of the classified information. In such situations, the United States’ principal concern is with ensuring that the defendant disseminates the classified information no further than necessary for the purposes of the litigation.

6. Here, however, by way of contrast, neither the defendants nor their counsel knowingly possesses classified information. During the pretrial proceedings in the instant case, the United States has concluded that certain classified information may be discoverable. As a result, the entry of a Protective Order will be required, in order to prevent the unauthorized disclosure of such classified information by the defendants and/or their counsel.

7. Based upon a review of the Indictment in the instant case, the United States alleges that each of the defendants was a member of an organization, the Palestinian Islamic Jihad (“PIJ”), which engaged in acts of terrorism. This organization is still in existence and remains actively engaged in acts of terrorism. Indeed, on

October 2, 2003 the Department of State redesignated the PIJ as a Foreign Terrorist Organization. Redesignation of Foreign Terrorist Organizations, 68 Fed. Reg. 56860-61 (Oct. 2, 2003).<sup>2</sup> Moreover, the current worldwide leader of PIJ, Ramadan Shallah, is an indicted defendant in the case and continues to espouse the PIJ's terrorist goals.<sup>3</sup> Thus, the United States seeks a particularized Protective Order, that will deny the

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<sup>2</sup>In its order regarding the Government's motion to detain the defendants pending trial, the Magistrate Judge noted that:

Comprehending the seriousness of the offenses leveled against these Defendants requires perspective. In the overwhelming majority of cases prosecuted in federal court, the charged offense impacts no more than a few victims. For some cases, like serious drug crimes or organized criminal rings, the breadth of the affected might extend to a neighborhood or a local community. And almost always, the prospect of economic gain drives the conduct. This case is different. The breadth of the affected here extends to nations and world regions. Moreover, a zealous commitment to violent philosophy fuels the actors.

Order, April 10, 2003, Docket No. 74 at 3.

<sup>3</sup> In late March, 2003, the Associated Press reported that Iraq had given \$34,000 to the family of an Iraqi army officer who killed four U.S. soldiers in a suicide attack. The AP also reported that Ramadan Shallah commented on this attack, declaring that the PIJ had "martyrdom seekers" in Iraq and that "we say to all sons of Jihad and supporters, to our nation, our people, wherever they are, that whoever is able to march and reach Iraq, Baghdad, Najaf and blow himself up in this American invasion. . . . This is the climax of Jihad and the climax of martyrdom." Associated Press, *Iraq rewards family of suicide bomber* (March 30, 2003), available at [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1049073048320\\_28?s\\_name](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1049073048320_28?s_name).

The PIJ's interest in the criminal case in Tampa was confirmed by wire reporting printed in the St. Petersburg Times on February 22, 2003, shortly after the instant indictment was unsealed. Abdallah Shami, the regional leader of the PIJ in the Gaza Strip, reportedly "condemned" the arrests of Al-Arian and the other defendants, but said the PIJ would continue to focus on its fight against Israel. St. Petersburg Times, *Islamic Jihad rules out retaliation against U.S.* (Feb. 22, 2003), available at [http://www.sptimes.com/2003/02/22/Worldandnation/Islamic\\_Jihad\\_rules\\_o.shtml](http://www.sptimes.com/2003/02/22/Worldandnation/Islamic_Jihad_rules_o.shtml). Shami was apparently overruled a month later by Shallah, as indicated in the preceding paragraph.

defendants themselves, but not their counsel, access to classified information. Without such a particularized Protective Order, there is simply no effective method of ensuring that disclosure of national security information to the defendants will not ultimately be communicated to others inside or outside the United States who belong to or sympathize with the organization to which the defendants belonged at the time they are alleged to have committed the offenses charged in the indictment.

8. The circumstances present in the instant case are similar to those present in United States v. Rezaq, 156 F.R.D. 514, 525 (D.D.C. 1994), vacated in part on other grounds in United States v. Rezaq, 899 F. Supp. 697 (D.D.C. 1995), where the District Court entered a Protective Order that authorized counsel for the defendant to obtain access to classified information, but not the defendant himself without an additional order of the Court.

#### **MEMORANDUM OF LAW**

9. The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, provides procedures designed to protect the rights of the defendant while minimizing the associated harm to national security in cases where classified information may be relevant to the criminal proceedings. See United States v. Rezaq, 134 F.3d 1121, 1142 (D.C. Cir. 1998).

10. Section 3 of CIPA and Federal Rules of Criminal Procedure 16(d)(1) and 57 authorize the Court to issue a protective order to prevent disclosure or dissemination of sensitive information that could compromise national security. See United States v. Rezaq, 156 F.R.D. 514, 523 (D.D.C. 1994). The legislative history of CIPA reflects the

type of protection that can be sought in a protective order to ensure that classified information is not improperly revealed and disseminated:

The court is given authority to issue orders protecting against the disclosure of classified material in connection with the prosecution by the United States. . . . The details of each order are fashioned by the trial judge according to the circumstances of the particular case. The terms of the order may include, but need not be limited to, provisions: (1) prohibiting the disclosure of the information except as authorized by the court; (2) requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed; (3) requiring controlled access to the material during normal business hours and at other times upon reasonable notice; (4) requiring the maintaining of logs recording access by all persons authorized by the court to have access to the classified information in connection with the preparation of the defense; (5) requiring the making and handling of notes taken from the material containing classified information; and (6) authorizing the assignment of government security personnel and the provision of government storage facilities. Punishment for violation of a protective order would be a contempt of court.

S. Rep. No. 96-823, reprinted in 1980 U.S. Code Cong. & Ad. News 4294, 4299 (96<sup>th</sup> Cong. 2d Sess.).

11. The purpose of CIPA is to minimize threats by the defendant to disclose classified information in the course of litigation by requiring rulings, before trial, on the admissibility of such information. See id. Such threats can arise in various circumstances, such as the following: (1) in pretrial discovery the defendant pressures the government to release classified information the threatened disclosure of which might force the government to abandon the prosecution; (2) the government expects to disclose classified information in the prosecution, and endeavors to restrict the dissemination of the information; and (3) the defendant has acquired classified information before the initiation of prosecution and seeks to disclose such information during the litigation. See United States v. Pappas, 94 F.3d 795, 799-800 (2d Cir. 1996).

Section 3 of CIPA provides that, on motion of the government, the court must issue a protective order to guard against the disclosure of classified information disclosed by the government to the defendant during criminal litigation. See id. at 800.

12. To the extent that the defendant himself does not need to know classified information to effectively assist in his defense, a protective order issued pursuant to CIPA may prohibit defense counsel from disclosing classified information to the defendant that has been provided by the government in discovery. See United States v. Rezaq, 156 F.R.D. at 524. In granting the government's motion for a protective order, the Rezaq court explained that because the defendant was alleged to be a terrorist with connections to an international terrorist network, and did not have a security clearance, disclosing sensitive evidence to him posed a risk to national security. Id. In United States v. Moussaoui, 2002 WL 1987964 (E.D. Va. Aug. 23, 2002), the District Court Judge entered a CIPA protective order denying access by the defendant to classified information. See also United States v. Bin Laden, 2001 WL 66393 (S.D. N.Y. January 25, 2001) at \*4. The government's proposed order is patterned after the Moussaoui order.

13. In prior submissions to this Court in response to the government's original proposed CIPA order, several of the defendants complained that the proposed order was not sufficiently tailored to this particular case. That argument ostensibly was based largely on the fact that at the time, the FISA communications remained classified and subject to the proposed CIPA order. That ground for the objection no longer exists, and the government contends that the circumstances of this case are now quite similar to those in Rezaq, Bin Laden, and Moussaoui, for the reasons set forth in paragraph 7

above. In addition, a virtually identical protective order was recently entered by the District Court in United States v. Fawaz Damrah, Case No. 1:03 CR 484, Northern District of Ohio, Eastern Division (Judge Gwin). A copy of the Damrah protective order is attached hereto as Exhibit A. Fawaz Damrah was convicted on June 17, 2004 for fraudulently obtaining citizenship, in violation of 18 U.S.C. 1425, by lying about his association with the Islamic Committee for Palestine (“ICP”), and the PIJ. In that case, videotape evidence played for the jury showed Damrah at ICP functions with several of the defendants in this case, including Sami Al-Arian, Bashir Nafi and Abd Al Aziz Odeh. These tapes were seized from the Al-Arian residence and the premises of WISE in November, 1995. One tape shows Damrah on the podium with Sami Al-Arian, with Damrah introducing Al-Arian as “the head of the Islamic Committee for Palestine.” Damrah then explains on the video that the ICP is the “active arm of the Islamic Jihad Movement in Palestine. We preferred to call it the ‘Islamic Committee for Palestine’ for security reasons.” Government’s Exhibit G-8. Moreover, the Damrah Court held that declassified FISA communications from this case were admissible against Damrah. The government subsequently introduced into evidence at trial a number of FISA conversations and several faxes intercepted pursuant to the investigation of Sami Al-Arian. In the Damrah case, the government likewise contended that because the defendant was alleged to be affiliated with the PIJ, and the PIJ currently engaged in acts of terrorism in the Middle East, the defendant should not be granted access to classified information unless the court found that special circumstances warranted such disclosure.

14. Defense counsel have also argued in prior pleadings that the prohibition in



the proposed protective order against disclosing classified information to the defendants is an unconstitutional infringement of the Sixth Amendment's right to assistance of counsel. This issue has been addressed by a number of courts, which have held that the need to protect sensitive information outweighs the defendant's need to know all the information personally when his knowledge of it will not contribute to his effective defense. See Rezaq, 156 F.R.D. at 525. In Bin Laden, the District Court for Southern District of New York explained that a similar protective order was warranted because of the serious risk that unauthorized disclosure of classified information would jeopardize an ongoing government investigation into the activities of alleged associates of the defendants. 2001 WL 66393 at \*2, citing United States v. Bin Laden, 58 F. Supp.2d 113, 121-22 (S.D.N.Y. 1999). After citing a variety of cases in which courts had limited a defendant's access to information without violating the Constitution, and advising the government to continue its declassification efforts, the Bin Laden court concluded by noting that "[a]t the end of the analysis, however, given the Government's compelling interest in restricting the flow of classified information and in light of the weight of precedent endorsing similar restrictions, the Court rejects the Defendant's claim of an unconstitutional deprivation of counsel." 2001 WL 66393 at \*3-4. Similarly, in Moussaoui, the District Court explicitly found that the United States' interest in protecting its national security information outweighed the defendant's desire to review the classified discovery. 2002 WL 1987964, Case No. CR 01-455-A, (E.D. Va. 2002). Continuing, the Moussaoui court held that the defendant's Fifth and Sixth Amendment rights were adequately protected by counsel's review of classified discovery and

participation in CIPA proceedings. Id.<sup>4</sup>

15. Finally, in prior submissions, defense counsel have objected to certain provisions set forth in the proposed order are “overly restrictive.” For instance, in “Defendant Fariz’s Response to Government’s Motion for a Pretrial Conference and a Protective Order Pursuant to the Classified Information Procedures Act” (Docket No. 203), the defendant objects to, inter alia : a) the Court Security Officer’s (CSO) designation of a secure defense area; b) procedures established by the CSO; c) an area open only during normal business hours as approved by the CSO; d) no documents allowed to be removed from the secure area without CSO approval; e) CSO supervision of attorney-client meetings in the secure area; f) filing of defense pleadings through the CSO (which is not required of the government); g) defense documents containing classified information must be prepared and stored in a secure area; h) defense may not discuss classified information over the phone; and i) all notes containing classified information must remain with the CSO. In objecting to such provisions, the defendants conveniently avoid the fact that the CIPA was enacted to protect unauthorized disclosure of classified information; that is, it governs the *defendants’ access to classified, sensitive, national security information which belongs to the government*. The government, on the other hand, as owner of the information,

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<sup>4</sup> Predecessor defense counsel for Sami Al-Arian previously objected to the Court’s Order of June 12, 2003 (Docket No. 162), instructing defense counsel to complete the paperwork required by the government to obtain security clearances. On July 14, 2003, the District Court denied the motions and instructed defense counsel to complete the paperwork within ten days (Docket No. 175). This issue ultimately became moot because predecessor counsel withdrew from the case and the government declassified the FISA communications.

is uniquely situated to have in place its own procedures and safeguards by which its own employees must protect the information<sup>5</sup>. The government, as owner of the information, also has at its disposal statutory classification authority, and can more readily assess the risks associated with disclosure of national security information.

WHEREFORE, the United States respectfully moves the Court to grant its Motion for a Pretrial Conference and a Protective Order pursuant to CIPA.

Respectfully submitted,

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<sup>5</sup>Indeed, government employees who have been granted access to classified information must adhere to restrictions similar to many of those deemed objectionable by Defendant Fariz.

**CERTIFICATE OF SERVICE**

I hereby certify that on July 14, 2004, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Kevin T. Beck  
M. Allison Guagliardo

I hereby certify that on July 14, 2004, a true and correct copy of the foregoing document and the notice of electronic filing was sent by United States Mail to the following non-CM/ECF participants:

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